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In The

Supreme Court of the United States

OCTOBER TERM, 1980

VITO CARIELLO,
PETITIONER

-vs-

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. In finding that petitioner, a labor union's treasurer, had joined a conspiracy in which other union officials obtained personal loans from banks where petitioner routinely deposited employee benefit trust funds, did the court of appeals disregard this Court's teachings that "all of the evidence" must be searched for "clear, not equivocal" proof of guilty knowledge, and instead adopt a standard for factual review which grossly distorted an undisputed record and which yielded a finding of guilt by association?

2. In approving and inviting the taking of special verdicts in criminal cases before -- rather than after -- a general verdict has been returned did the Third Circuit (a) sanction a practice which is not authorized by the Rules of Criminal Procedure, and (b) create a conflict with the

other circuits, none of which approves the taking of special verdicts in criminal cases before a general verdict has been rendered?

3. In approving the special verdicts used this trial, did the court of appeals overlook specific prejudice to petitioner, namely, that the special verdict form addressed only a single element of the RICO offense -- loans, none of which benefited petitioner -- and thereby obscured the essential element that was critical for petitioner, to wit, whether petitioner selected depository banks with knowledge that another union official had been leading bankers into the erroneous belief that trust fund deposits were conditioned upon the granting of personal and business loans?

4. Was the court of appeals patently in error in its alternative holding that the special verdict issue had been waived, where (a) contrary to its

opinion, an unequivocal timely objection to taking special verdicts was made at trial, as the prosecution indeed had conceded, and (b) the court found a waiver in the failure to present an objection when moving for a new trial, notwithstanding this Court's settled teaching that timely objections at trial are automatically preserved for appellate review?

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IN THE SUPREME COURT OF THE UNITED STATES

VITO CARIELLO, Petitioner,

- versus -

UNITED STATES OF AMERICA, Respondent.*

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Vito Cariello hereby petitions that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review its judgment at No. 79-2149.

OPINION BELOW

The opinion of the court of appeals was filed on September 3, 1980. It is published at 630 F.2d 192 and reproduced at 1a.

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* Other parties in the court below were Joseph Campisano (petitioner at No. 80-1271); Ernest P. Palmeri, Sr., and Frank Smith (petitioners at No. 80-1120); and Flen Chestnut (as to whom the court of appeals found the evidence insufficient).

JURISDICTION

Petitioner was convicted after trial by jury on indictment No. 78-297 in the United States District Court for the District of New Jersey. He received a four year custodial sentence which has been stayed pendente lite.

The judgment below (29a), affirming his conviction, was filed on September 3, 1980. An order (32a) denying his petition for rehearing was filed on November 6, 1980.

An order (34a) was entered by the Circuit Justice on December 8, 1980, extending the time within which to file the instant petition up to and including February 4, 1981.

This Court's certiorari jurisdiction is established by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Due Process clause of the Fifth Amendment to the Constitution, the Trial by Jury clause of the Sixth

Amendment to the Constitution, 18 U.S.C. §§ 1954, 1961, 1962, and Federal Rules of Criminal Procedure 31, 51. The pertinent provisions are reproduced at 35a.

INTRODUCTORY STATEMENT

Vito Cariello, at all times pertinent, was the treasurer of Teamsters Local 945's Severance Fund and Welfare Fund. In that capacity, he performed essentially ministerial duties in compliance with the trustees' investment policy of maintaining assets in bank certificates of deposit (CD's). Petitioner was obliged to seek and obtain competitive interest rates, and to avoid concentrating assets in any one bank. His discretionary powers were limited to selecting depository banks with the approval of a management trustee who co-signed the check with which each CD was purchased.*

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* Management trustee Pompeo Iommetti, who co-signed each of the 18 trust fund checks in evidence, was never named in the indictment or in the testimony.

Between June 1973 and October 1978 petitioner and the management co-trustee deposited trust funds at 18 different local banks. The prosecution charged that petitioner selected nine of those banks to further a scheme whereby Ernest Palmeri, Sr., a business agent of the local and a co-defendant of petitioner, would receive or arrange for personal or business loans. The RICO count of the indictment put in issue 44 such Palmeri loans and one kickback to a Palmeri nominee (hereinafter all referred to as "loans"), together with a separate and unrelated first mortgage obtained by business agent Chestnut on his home without Palmeri's involvement, on the theory that each of these third-party loans was a bribe to petitioner in violation of 18 U.S.C. § 1954.

Although the gist of the accusation was bribery, the government made absolutely no claim that petitioner benefited, directly or indirectly, from any of the Palmeri loans.

And although petitioner knew about the Chestnut mortgage, which was a wholly innocent and routine transaction that involved no loans-for-deposits understanding, the prosecution offered no evidence whatsoever -- direct, circumstantial, or even hearsay -- that petitioner knew about the 45 loans from depository banks to Palmeri and his nominees.

Neither did the prosecution claim that petitioner violated the trustees' investment standards, jeopardized the assets of the trust funds, or obtained rates of interest which were lower than might have been available. It was undisputed that petitioner safeguarded the trust funds zealously. The cestuis que trust lost nothing; petitioner gained nothing.

The prosecution freely acknowledged that petitioner had no stake in the charged criminal venture. The theory of criminality described in its opening statement portrayed petitioner as:

> "the key to the other defendants obtaining loans and kickbacks from the banks. For this fund money which you will learn was his responsibility to invest was used as leverage to obtain loans and kickbacks."

Early in the trial, the prosecution acknowledged that in order to sustain its theory it obviously had to prove that Mr. Cariello knew about the loans. And it candidly conceded that its case against petitioner

> "is going to be a circumstantial case; it's going to be a question of whether he knew * * * what the others were doing and played along with it."

Later, the prosecution entered into a stipulation (69a) that in his capacity as treasurer, petitioner regularly reported to a number of union personnel, including each of his co-defendants, on financial matters. This stipulation indisputably established that the charged loans-for-deposits scheme could operate without petitioner's knowing participation; at the local's headquarters, the banks holding deposits and the dates

when CD's would be up for renewal was common knowledge. Under the stipulated facts, it would be a simple matter for any of the co-defendants to tell bankers that deposits were conditioned upon approval of personal and business loans, and there was no way petitioner could know of this nor could he prevent it. The stipulation therefore supported a reasonable hypothesis of petitioner's innocence that nothing in the record would refute.

By the end of the trial, the government told the jury it recognized "that the issue with regard to Mr. Cariello is whether he knowingly allowed the funds to be used to obtain loans and kickbacks." Thereafter the prosecution pointed to no proof of petitioner's "knowledge;" it sought to have the jury infer "knowledge" from the labor union relationship of the various defendants, while making no serious claim that petitioner knew about the loans. The

prosecution's closing statement repeatedly condemned him for "allowing" trust funds to be misused, arguing to the jury that but for petitioner's knowing co-signing of certain checks with which CD's were purchased, his co-defendants could not have obtained loans from the issuing banks. How co-signing checks with which he made lawful deposits supports the required inferences that petitioner knew about the loans and sought to facilitate their approval has never been explained.

Petitioner's position is that he is innocent in fact, and that the proofs offered at his trial were insufficient as a matter of law. He contends that the jury's erroneous determination resulted from the use of a special verdict form. That form effected the judicial highlighting of one element of the charged offenses -- loans, a critical issue for his co-defendants -- and concomitantly led the jury to overlook the

different element -- knowledge -- upon which petitioner's substantial defense was bottomed.

Petitioner further contends that on appeal, the Third Circuit searched the record for any evidence whatsoever that could support the verdict. In doing so, that court removed testimony from its undisputed context, thereby imputing wholly unwarranted adverse meanings and inferences to proofs which were in fact guilt-negating.

In then holding that the prosecution's highly equivocal circumstantial evidence was adequate to establish petitioner's guilty knowledge and intent, the Third Circuit disregarded the review standards laid down by this Court; it substituted a standard of review for sufficiency which inevitably imputes guilty knowledge and intent to unwitting accomplices who have organizational relationships with each other or with knowing perpetrators.

The specific issues presented in this Petition therefore are not academic technicalities; they are fundamental. They go to the methods by which first a jury, and then a reviewing court, must determine guilt or innocence. Accordingly, their proper resolution is essential to the true administration of justice.

STATEMENT OF THE CASE

A: THE INDICTMENT

Petitioner, together with Local 945's president (Joseph Campisano) and three of its business agents (Flen Chestnut, Ernest P. Palmeri, Sr., and Frank Smith), was indicted in the United States District Court for the District of New Jersey. The 23-count indictment (40a) charged three groups of offenses, all related to loans made by nine of the 18 banks in which petitioner had deposited assets of the Severence and Welfare Funds.

Counts 1 and 2 invoked the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq. All five defendants were charged in Count 1 with conspiring in violation of 18 U.S.C. § 1962(d) to conduct the affairs of the union local "through a pattern of racketeering activity involving multiple violations of [18 U.S.C. § 1954]" (¶ 2). All five

defendants were charged in Count 2 with violating 18 U.S.C. § 1962(c) (the substantive RICO offense) by receiving and agreeing to receive 45 loans and one "kickback" or finder's fee:

> "because of and with intent to be influenced with respect to their actions, decisions and duties relating to questions and matters concerning the investment of the assets of the Welfare Fund and Severance Fund, to wit, the purchase of certificates of deposit at [specified] banks with the assets of the Welfare Fund and Severance Fund . . ." [¶ 2].

Counts 3 through 15 invoked 18 U.S.C. § 1954. That statute condemns bribery in the management of employee benefit trust funds such as Local 945's Welfare Fund and Severance Fund. Each of these counts charged that petitioner, business agent Palmeri, and in some cases one or more of the other defendants, obtained a specific loan as the quid pro quo for "the purchase of certificates of deposit at the [lending] bank with assets of" Local 945's Severance and/or Welfare Funds. Each of these 13 loans was

also charged as one of the 46 listed in Count 2.

The remaining counts invoked 18 U.S.C. § 1014. That statute condemns the making of false statements on loan applications submitted to federally-insured banks. Counts 16 through 23 charged various of petitioner's co-defendants with making false statements when applying for eight of the 46 loans listed on the schedule annexed to Count 2. The grand jury did not charge, and the prosecution never contended, that petitioner made any loan applications whatsoever. Petitioner was not involved in any way with counts 16 to 13.

B: INSUFFICIENCY OF THE EVIDENCE

From the outset, the prosecution conceded that the evidence as to petitioner was different from that against his co-defendants. Although petitioner had been cited by the grand jury as a participant in every one

of the 46 loans, petitioner was the only defendant who received no loans; he, alone, had no stake in the venture. Not only did petitioner enjoy no personal benefit from the charged bribery scheme; the trust funds, which the statutes involved seek to protect, suffered no loss and no unauthorized or unreasonable risk of loss.

The prosecution readily acknowledged that its case against petitioner was circumstantial. But for every circumstance which the prosecution cited as pointing to petitioner's participation in the scheme, its own witnesses told of incidents that were inconsistent with his guilt: Petitioner ignored a suggestion by the local president to make additional deposits at the Anthony Wayne Bank; petitioner renewed CD's at the Bank of Bloomfield on six occasions during 17 months after the forced resignation of its corrupt president, later indicted for 212 counts of bank fraud, even though

Palmeri could obtain no more loans from that bank; petitioner demanded and promptly obtained an upward adjustment in the interest rate on one CD, notwithstanding Palmeri's assurance to the banker that petitioner would honor the "deal" Palmeri had made to exchange a kickback for a reduced interest rate.

At bottom, when all the circumstances are considered, nothing emerges which is inconsistent with petitioner's assertion that he was an unwitting accomplice, that he picked depository banks on the basis of their interest rates and not on the basis of their loan policies. And it is of no small significance that none of the witnesses testified that petitioner was present, let alone participating, during discussions at which loans were tied to deposits.

Contrary to the foregoing assertion, the opinion below appears to place petitioner in the midst of some incriminating conversa-

tions. In each instance, however, the government's own witnesses verified that petitioner was absent every time that the topic of loans-for-deposits was being discussed. Two examples will demonstrate that the court of appeals interpreted the "light most favorable to the government" standard as a license to divorce evidence from its undisputed context.

Judge Aldisert wrote for the court below (6a):

> In April, 1974, Palmeri and two officials from other unions threatened to withdraw their union deposits from the State Bank of Chatham unless [banker] Smith adopted a one hundred percent loans-for-deposits ratio. At that point Cariello and Campisano entered the room and Cariello announced that the union could keep its money in any bank with a competitive interest rate. On the promise of still more deposits, and with the approval of the bank's board of directors, Smith ultimately agreed to a sixty percent ratio.

That quotation unequivocally implies that petitioner was a party to corrupt bargaining and was completely immersed in a

loans-for-deposits scheme. The record, however, directly disputes that implication.

The sole pertinent testimony came from banker Smith. He testified that the meeting at which a loan-to-deposit ratio was bargained took place at business agent Palmeri's office in Local 945's headquarters. But when petitioner and the local's president entered the room, the loan-to-deposit ratio discussion stopped. Petitioner was asked whether it mattered in which bank funds were deposited. He answered that his sole concern was to obtain a competitive interest rate. He then left the meeting. After petitioner's departure, the bargaining resumed and a 60% ratio was worked out.

By disregarding the undisputed fact that petitioner was not present during the "ratio" conversation, the court of appeals generated an unwarranted and wholly arbitrary inference of petitioner's guilty knowledge and intent. A similarly skewed read-

ing of an undisputed record yielded a false condemnation of petitioner with respect to the charged kickback.

The testimony indicated that a $1000 finder's fee was paid to a Palmeri nominee in exchange for the Welfare Fund's purchase of a $100,000 certificate of deposit from the State Bank of Springfield. The bank had attempted to recoup this finder's fee by reducing the rate of interest it paid on the certificate. Upon learning of the CD's interest rate petitioner demanded an upward adjustment. The banker then asked Palmeri to get petitioner off his back. Palmeri assured the banker, "You got a deal. Don't worry about it" (11a).

The court of appeals found in the "deal" conversation a convincing "refutation of Cariello's assertion that he relied solely on interest rates in placing the funds" (27a). But in reaching that conclusion, the Third Circuit disregarded crucial undisputed

testimony, all of which came from the government's own witnesses. Cariello had not participated in the negotiation of the kickback; Cariello never agreed to or acquiesced in a non-competitive interest rate; and Cariello was not present when Palmeri told the banker he had a "deal."

Most significantly, the court below made no mention of the undisputed fact that because of Cariello's insistence, the bank was forced to raise the interest rate to the level petitioner had demanded. There was obviously no "deal" so far as petitioner was concerned; neither was there any refutation of petitioner's contention that he was concerned with rates of return, and not with lending policies, when he made deposit decisions.

In the entire record, the only loan of which petitioner was shown to have any knowledge was the residential first mortgage obtained by business agent Chestnut from

Totowa Savings and Loan Association. Petitioner's involvement in that transaction was innocuous and the loan was wholly proper; he had called an officer at Totowa and asked whether it could provide mortgage financing for an employee of the local union. The banker indicated that it would depend upon the merits of the application. Petitioner then picked up a blank mortgage application, which Chestnut later completed and submitted to Totowa.

The Chestnut mortgage was routinely processed. The government's banker-witness testified that no special influence was involved at any stage; the application was approved on its merits. Chestnut received no special consideration in the decision to lend or in the rate of interest. There had been no intimation at any time that trust fund deposits would be conditioned upon the granting of a mortgage to Chestnut. Because there was no quid pro quo understanding,

this loan was an innocent transaction; it involved no violation of § 1954, and the government did not even charge it as an independent crime.

Beyond being wholly innocent on its face and on the available record, the Chestnut mortgage is easily distinguished from the other loans identified in the indictment. This was the only residential first mortgage among the 46 loans placed in issue. It was the only fully secured loan. It was the only loan in question that had been granted by a thrift institution; all 45 of the other loans came from commercial banks. Thus, the Chestnut mortgage was qualitatively unique; it did not conform to the modus operandi of the overall scheme.

Most importantly, Chestnut's mortgage was the only loan in which Palmeri -- the "hub" of the conspiracy (24a) -- was not involved. The Chestnut mortgage, therefore, had been an isolated transaction. It in no

way implicated Cariello in any wrong, let alone in the charged conspiracy and the other 45 loans.

The Third Circuit nonetheless held this one loan to be the essential and otherwise missing "link" (26a) between petitioner and the overall scheme, even as it exonerated Chestnut of all charges. If, as is demonstrable, the Third Circuit has adopted wholly indefensible standards for attributing guilty knowledge and intent to petitioner on the basis of this "link," then the entire case against Cariello falls.

C: THE SPECIAL VERDICTS

The jury was directed to return special verdicts with its general verdicts. The special verdict form and accompanying instruction (70a) asked whether particular defendants were "guilty" or "not guilty" on each of the "racketeering acts," i.e., the 46 loans, that were listed in Count 2 (46a).

Petitioner was the only defendant who did not negotiate or receive any of those loans. Nevertheless, because he had signed each of the deposit checks for the trust funds, he, and he alone, was accused of complicity in all 46 of the questioned transactions.

Petitioner's attorney vigorously argued against providing the Count 2 loan schedule to the jury, fearing that the sheer number of loan accusations would distract the jury from separately evaluating his client's knowledge and intent. The trial judge recognized the danger of this happening, but decided that this danger to petitioner would be offset by a compensating advantage to some other defendants, who were only cited for a handful of the loans. In deciding not to withhold any part of the indictment from the jury, the district judge acknowledged he was balancing petitioner's rights against those of some co-defendants with the comment

that "it kind of cuts both ways."

The indictment therefore went into the jury room, complete with the loan schedule. The jury's special verdict form could not be filled out without repeatedly referring to that loan schedule, because the verdict form only identified the 46 loans by number, whereas the schedule identified the bank, the borrower, the date, and the amount of each loan.

On appeal, petitioner contended that special verdicts are not authorized in criminal cases and should be eschewed. The Third Circuit rejected this contention. In a radical departure from traditional jurisprudence, it commended resort to special verdicts in all complex criminal cases (21a):

> "We think special interrogatories were properly employed to decrease the likelihood of juror confusion and to aid the jury in concentrating on each specific defendant, and the charges against him, rather than incriminating

> one potentially innocent defendant solely on the basis of his association with the others."

The circuit court further opined "that the [special] verdict form did not compel the jury to convict the appellants by constructing a chain of findings leading to inevitable conviction" (22a).

The record, however, contains decisive evidence indicating that at least one of petitioner's co-defendants suffered from precisely the prejudice which petitioner claims and which the Third Circuit could not find. The special verdict form led the jury to convict business agent Chestnut on the basis of his participation in a few of the loans. The court of appeals overturned the verdicts against Chestnut, because it could find no record proof establishing that Chestnut knew his loans were granted in exchange for deposits. The special verdict form, by highlighting the loans and therefore obscuring other questions such as know-

ledge and intent, had evidently catechized the jury to find Chestnut guilty by association.

The situation as to petitioner was even more compelling than as to Chestnut. Chestnut had had a stake in the venture; he had obtained some of the loans. Petitioner's whole defense was that he had never been bribed; his deposit decisions had been made on the basis of the available interest rate. But the special verdict form asked nothing about the reason for making particular deposit decisions; it only asked about the loans, none of which went to petitioner.

A substantial risk therefore inhered in the special verdict form. It highlighted a single issue -- loans -- that was wholly irrelevant to petitioner's defense, and it therefore was likely to divert the jury from the crucial task of ascertaining why petitioner made particular deposits.

Had petitioner known of Palmeri's representations that deposits were conditioned upon the granting of personal loans? Had petitioner been influenced in his selection of banks by the availability of loans to Palmeri and Palmeri's nominees? Or had petitioner's associates taken advantage of petitioner's regular financial reports to generate loans for themselves, just as a bank robber may take advantage of routine employee arrivals to gain illicit entry? These questions, upon which petitioner's guilt or innocence must turn, were beyond the scope of the special verdict form.

D. THE WAIVER HOLDING

The court of appeals offered an alternative holding that the special verdict issue had been waived (19-20a). There were three components to the waiver holding. First, the court found an acquiescence in the taking of special verdicts when petitioner's counsel argued against sending the

loan schedule into the jury room (19a & n.7). Second, the court reasoned that "[i]t is not unfair . . . to require a criminal defendant to object, at least generally," to the use of special interrogatories (20a at n.8). Finally, the court apparently found conclusive proof that a waiver was intended because "[t]he objection to the special interrogatories was not raised in post-trial motions for a new trial." The factual basis for this waiver holding simply does not exist.

Counsel's argument about the loan schedule had been made before he learned what form the special interrogatories would take. As noted above, the interrogatories that were used could not be answered without repeatedly referring to the loan schedule which counsel had tried to keep from the jury. Hence, rather than obviating the danger inherent in the jury's access to the

loan schedule, the special verdict form exacerbated that danger.

Upon completing the charge to the jury, the district judge gave all parties an opportunity to register objections before the jury retired to deliberate. Counsel for defendant Palmeri, whose objections the court had just declared would be "reserved to each defendant," stated (Tr. v. XIII, p. 78):

> "Your Honor, I also objection [sic] to the verdict form in so far as Count 2 is concerned. I realize the purpose that Your Honor had in mind in preparing that form, nonetheless it is my position that it would tend to highlight these allegations and potentially mislead the jury."

This objection, it must be noted, was pointed out in petitioner's Brief to the court below. In response, the prosecution conceded that at the very least, a general objection to the taking of special interrogatories had been timely made. It asserted in its Brief, at 47:

"Appellants did object to the use of this verdict form (13.78) but not on the grounds now advanced, and they made no request or suggestion to aid the Judge in his dilemma [i.e., precluding a retrial by ascertaining which predicate violations the jury had found]".

REASONS FOR GRANTING CERTIORARI

I. WHETHER AND WHEN SPECIAL VERDICTS MAY BE TAKEN IN CRIMINAL CASES IS AN IMPORTANT QUESTION IN THE ADMINISTRATION OF JUSTICE AS TO WHICH THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS AND AS TO WHICH THE COURT BELOW RADICALLY DEPARTED FROM THE TRADITIONAL WISDOM

A. The decision of the court of appeals in this case portends a radical change in the role of juries in federal criminal cases. Special verdicts -- interrogatories of a jury -- are a well understood technique in civil cases and find authorization in Civil Procedure Rule 49(b). But they are not authorized by the Rules of Criminal Procedure except in forfeiture cases. See Rule 31(e).

The special verdict, when procured before any general verdict of guilt has been found, inevitably fetters the jury. It necessarily calls upon the jury to explicate

its reasoning and justify its verdict. It inherently intrudes into a jury's deliberations by highlighting certain issues as those which the judge deems crucial.

It might be one thing to pose questions to a jury after it has brought in a general verdict finding guilt.* In that event, the interrogatory may serve as a further protection to the defendant since it can test the validity and the scope of the general verdict. But to put special interrogatories to a jury before it has come back with a general verdict of guilty obstructs one of the major constitutional functions of the jury in a criminal case, namely, to temper the demands of the law with the conscience of a cross-section of the accused's community. That practice hobbles the undoubted

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* It is beyond dispute that special interrogatories could never be put to a jury after it has returned an acquittal. This has been the law at least since Bushell's case, Vaughn 135, 6 How. St. Tr. 999, 124 Eng. Rep. 1006 (1670).

power of a jury "to bring in a verdict in the teeth of both the law and the facts." Horning v. District of Columbia, 254 U.S. 135, 138 (1920)(per Justice Holmes). As Prof. Thayer long since had observed, A Preliminary Treatise on Evidence 218-19 (1898):

> "Logic and neatness of legal theory have always called loud, at least in recent centuries, for special verdicts . . .. But considerations of policy have called louder for leaving to the jury a freer hand. The working out of the jury system has never been shaped merely by legal or theoretical considerations. That body always represented the people, and came to stand as the guardian of their liberties; so that whether the court or the jury should decide a point could not be settled on merely legal grounds; it is a question deeply tinged with political consideration. While it would always have been desirable from a legal point of view, to acquire from the jury special verdicts and answers to special questions, that course would have given more power to the king and less to the people."

In the case at bar, the court of appeals acknowledged that "special verdicts are disfavored in criminal cases" (19a). Just one year earlier it had made a similar

statement, explaining that "there is the belief that in the long run, special verdicts are not favorable to defendants because 'by a progression of questions, each of which seems to require an answer unfavorable to the defendant, a reluctant juror may be led to vote for a conviction which in the large he would have resisted.'" United States v. Frezzo Bros., 602 F.2d 1123, 1129 (3d Cir. 1979).

And the views of the Third Circuit, so expressed, were fully consistent with its frequently cited opinion per Judge Maris in United States v. Noble, 155 F.2d 315, 317 n.4 (3d Cir. 1946).

In now casting aside its long-settled understanding of the dangers of special verdicts in criminal cases, the Third Circuit has gone to the extreme of permitting, and obviously encouraging, the use of special interrogatories even before the jury has announced its general verdict. Without so much as recognizing the enormous

difference between a special verdict taken before and one taken after the return of a general verdict, and without citing to any supporting authority, the court of appeals has countenanced a fundamental change in the role of juries in federal criminal trials. The wisdom of that radical departure from long tradition merits this Court's attention.

B. The decision below conflicts with those in sister circuits. The Third Circuit stands alone in its encouragement of special verdicts. It is in conflict with a solid line of decisions in its sister circuits and with the considered opinion of a highly respected State court of last resort.

In the First Circuit, United States v. Spock, 416 F.2d 165 (1969), plainly forbids putting interrogatories to a jury before it has returned a general finding of guilt. This leading case has been generally

approved and extensively quoted for its analysis of the improper impact of such a procedure. Spock condemns that practice so long as there is no authorizing provision in the Rules of Criminal Procedure. That holding was explained by the Court as one involving the exercise of its supervisory power. Heald v. Mullaney, 505 F.2d 1241 (1974), cert. den., 420 U.S. 955 (1975).

In United States v. Adcock, 447 F.2d 1337 (2d Cir.), cert. den., 404 U.S. 939 (1971), the Second Circuit said quite clearly that in the absence of any specific authorization under the governing rules, special interrogatories are in and of themselves impermissible. This holding is highlighted by the subsequent decision of the Second Circuit in United States v. Huber, 603 F.2d 387 (1979). There, special verdicts were approved in a forfeiture case precisely because Rule 31(e) so permits.

In United States v. Bosch, 505 F.2d 78, 82 (5th Cir. 1974), the Fifth Circuit held

flatly, "special interrogatories should not be used in criminal trials."

In United States v. Wilson, 629 F.2d 439, 443 (6th Cir. 1980), -- an opinion handed down on the very same day as the Third Circuit's opinion in the case at bar -- the Sixth Circuit unqualifiedly rejected special verdicts except in "rare" cases and "for limited purposes."

In Gray v. United States, 174 F.2d 919 (8th Cir. 1949), cert. den., 338 U.S. 848 (1950), the Eighth Circuit held that resort to special verdicts in a criminal case invalidates a conviction.

The recent decision of the Supreme Court of New Jersey in State v. Simon, 79 N.J. 191, 398 A.2d 861 (1979), held that the use of special interrogatories called for reversal of a conviction even in the absence of objection at trial. The Simon opinion contains a thorough survey of the pertinent case law. It demonstrates that the cases in

which special interrogatories have been permitted present very special situations (79 N.J. at 202). That analysis presaged the conclusion of the Sixth Circuit, which in Wilson, supra, 629 F.2d at 443, noted that "for limited purposes in federal criminal proceedings special questions have been permitted but the cases are rare and they are distinguishable."

Finally, it should be noted that the leading treatise on federal practice states, "Where a special verdict is resisted by the defense, the trial court proceeds at its peril." 8A Moore's Federal Practice § 3102(3), p. 3109 (2d ed. 1979).

The court below ruled otherwise. In sharp contrast to the foregoing authorities, the Third Circuit's decision in the instant case invited the routine use of special verdicts in criminal cases.

If this Court is to permit any use of special interrogatories in criminal cases, it should certainly provide guidance (a) as

to what special circumstances justify their use, and (b) when the jury should be presented with such interrogatories.

C. The instant interrogatories prejudiced petitioner's defense. The court below gave short shrift to petitioner's substantial claim of specific prejudice, namely, that the particular form of special interrogatory used in this case highlighted loans which petitioner neither obtained nor contested, while obscuring the dispositive issue of petitioner's knowledge and intent.

The Third Circuit specifically characterized the loans as the "most crucial" issue for the jury to determine (22a), but surely the loans were not the dispositive issue for petitioner. If a panel of experienced jurists, the judges of the Third Circuit, could hold that one essential fact was more "crucial" to determining guilt than each of the others, and could so utterly

misperceive the critical issue in petitioner's case, is it not likely that the jurors fell into precisely the same pitfall? Did not the trial court's guidance invite that jury error because the special verdict form focused exclusively on the loans and made no mention of the issue of petitioner's knowledge and intent at the time he selected depository banks?

That the jury did in fact base its verdict upon the proof of loans while disregarding the other essential elements is evidenced both by the reversal of Chestnut's conviction and by the special verdicts against petitioner on the four loans issued by the Anthony Wayne Bank. The evidence on those transactions cannot be reconciled with the jury's special findings.

Early in September, 1973, petitioner purchased on behalf of the Severance Fund a 30-month $20,000 certificate of deposit from the Anthony Wayne Bank. As of the date of that transaction, there had been no

discussion by any party regarding loans from that bank.

Five weeks later, Palmeri obtained a loan from the Anthony Wayne bank; the next week he obtained another loan. The banker who granted those loans, testifying for the prosecution, asserted that these loans were approved on their merits. That banker further testified that he thereafter solicited additional deposits from Local 945 and its trust funds, but none were forthcoming.

In October 1975, more than two years after petitioner had made the deposit at Anthony Wayne, two of the bank's officers came to Local 945's headquarters and met with Palmeri and the local's president. The bankers had called the meeting for two reasons: Palmeri was delinquent on his loans, and the bank wanted to get additional deposits. According to one of those bankers, when they reached the topic of deposits, the local's president called

petitioner into the meeting and "suggested that Mr. Cariello should attempt to give * * * Anthony Wayne some additional business if possible."

Although the court of appeals considered that conversation highly probative, its opinion disregarded the undisputed evidence that petitioner made "no commitment" at the time, and thereafter petitioner made no further deposits at Anthony Wayne. That court's survey of the evidence moved directly from the "additional business" conversation to the proofs that Chestnut and Palmeri were each subsequently granted loans from Anthony Wayne, in the latter case over the objection of a junior officer.

The evidence of record therefore establishes that petitioner's single deposit of trust funds at Anthony Wayne was wholly lawful when made. But the special verdicts declare that his deposit decision transgressed § 1954 five weeks later, and again six weeks later, and twice more some two

years later. Conduct which was innocent when performed had become criminal solely because of the independent subsequent actions which third parties took without petitioner's knowledge or consent. The special verdicts on the Anthony Wayne loans thus exemplify the vice in submitting interrogatories and demonstrate that the instant resort to them posed a substantial likelihood of prejudice to petitioner.

The case therefore merits the attention of this Court in all aspects of the use of special verdicts in criminal cases. Absent an authorizing rule, may they be used at all? If so, may they be used before a jury has returned a general verdict of guilty? And if they may be so used, what standards governing their form will assure that those questions which are critical to a particular defendant's guilt or innocence are properly placed before the jury?

II. THE COURT OF APPEALS' WAIVER HOLDING PRESENTS A MARKED DEPARTURE FROM THIS COURT'S TEACHINGS AND RAISES IMPORTANT QUESTIONS REGARDING THE CONSTRUCTION OF CRIMINAL PROCEDURE RULE 51

The prosecution conceded that timely objection had been made to the taking of special verdicts, but the Third Circuit nonetheless found that appellate review of that issue had been waived. That waiver finding cannot withstand scrutiny. Beyond that, it puts in question practices in criminal procedure which heretofore appeared to be settled

The record contains no specific waiver; on the contrary, it contains a specific and timely objection. Counsel complained that the special verdict form "highlighted" a single facet of the accusation. Judge Aldisert's statement that not even a general objection had been pressed on the trial court therefore directly conflicts with the record. Indeed, the government acknowledged

in its Brief to the court below that a timely objection had been made to the taking of special verdicts.

The court of appeals' lapse in reviewing the record is exacerbated by its enunciation of a legal rule for which it cites to no authority. In stating the basis for its holding that the special verdict issue had been waived, the Third Circuit found significant the defendants' failure to mention the special verdict issue when moving for a new trial "in the interest of justice" pursuant to Rule 33. Its opinion states (20a):

> "The objection to the special interrogatories was not raised in post-trial motions for a new trial, most of which in this case dealt with allegations that the government had produced insufficient evidence to sustain convictions. Thus, the objection regarding the special interrogatories is not properly before us on this appeal."

That reasoning, which appears to be unknown outside of the Third Circuit, is in direct conflict with the liberal provisions of Criminal Procedure Rule 51 as construed in Lawn v. United States, 355 U.S. 339

(1958). There, this Court held that an issue is preserved for appellate review if a single timely objection was made at any point during the proceedings.

Accordingly, one subsidiary question presented by this petition is the standard for finding a waiver of major procedural protections. Encompassed therein is the continued vitality of Lawn and its construction of Rule 51. The disposition of this waiver issue obviously has enormous implications for the conduct of trial attorneys and for the scope of appellate review in all federal criminal cases.

III. THE STANDARD FOR REVIEWING THE SUFFICIENCY OF EVIDENCE OF KNOWLEDGE AND INTENT IS AN IMPORTANT AND RECURRING QUESTION AS TO WHICH THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS AND AS TO WHICH THE COURT BELOW DEPARTED FROM THIS COURT'S TEACHINGS

The question of criminal knowledge and intent has moved into the forefront in federal criminal cases because of the Department of Justice's increasing emphasis on prosecuting white collar crimes. In such cases, the conspiratorial dragnet almost invariably hauls in some who protest that they had no knowledge of the unlawful endeavor, albeit their otherwise lawful activities may have facilitated the criminal ends of other persons. That is precisely the situation petitioner brings to this Court.

The adequacy of proof of criminal knowledge and intent has been a recurring theme in this Court's decisions. See, for example, Ingram v. United States, 360 U.S. 672, 680 (1959); Morissette v. United States,

342 U.S. 246 (1952); Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943); United States v. Falcone, 311 U.S. 205 (1940). The controlling standard, as enunciated in Direct Sales and reiterated in Ingram, is that circumstantial proof of guilty knowledge and intent must be "clear, not equivocal." That standard protects the innocent from findings of guilt by association.

The court below clearly disregarded this Court's teachings when it held that the essential "link" to criminality was petitioner's knowledge of the Chestnut mortgage. The record establishes that Chestnut's mortgage was a wholly innocent transaction which had absolutely no connection to the overall conspiracy that had Palmeri at its hub. It seems self-evident that basing a finding of criminality upon knowledge of a lawful transaction hardly satisfies the

requirement of "clear, not equivocal" proof of knowing complicity.

Even if the Chestnut mortgage had involved a violation of § 1954, it nonetheless was an isolated transaction which will not support an inference of participation in a larger conspiracy. Hence the decision below is in conflict with those of at least three circuits: United States v. Wrehe, 628 F.2d 1079, 1084 (8th Cir. 1980)(as to Mary Lou Wrehe); United States v. Diecidue, 603 F.2d 535, 557 (5th Cir. 1979)(RICO case; as to Davis); and United States v. Peoni, 100 F.2d 401 (2d Cir. 1938). Cf. Kotteakos v. United States, 328 U.S. 750 (1946)(similar frauds committed by persons whose only connection is through a "hub" character do not establish a single, overall conspiracy). And the decision below cannot be reconciled with the Third Circuit's previous adherence to the isolated transaction analysis e.g., in United States v. United States Gypsum Co., 550 F.2d 115,

128 (3d Cir. 1977), affirmed, 438 U.S. 422 (1978).

Additionally, the Third Circuit's evaluation of the facts in this case disregarded two distinct principles which should have guided its assessment of the evidential sufficiency: First, all of the evidence has to be considered, albeit in a light favoring the prosecution. Second, a jury verdict simply cannot be upheld when stipulated facts establish an explanation of the questioned events which is wholly consistent with a reasonable hypothesis of innocence.

When evaluating the evidence in this case, the Third Circuit remarkably omitted any mention of the most critical facts bearing on the question of petitioner's knowledge of the Palmeri-procured loans. It was stipulated that petitioner innocently imparted to his co-defendants the information which would permit them to procure

loans as the quid pro quo for deposits without petitioner's knowing participation (69a):

> "During the period January, 1973 through January 1977 the executive Board of Local 945 had meetings in which Vito Cariello in his capacity as secretary-treasurer made financial reports. During this period of time there were approximately 15 union employees present, including for a substantial number of times Joseph Campisano, Ernest Palmeri, Flen Chestnut and Frank Smith, among others."

A. The court of appeals insisted that it was reviewing the evidence in the light most favorable to the prosecution (22a) -- but it obviously was not reviewing all of the evidence. In Jackson v. Virginia, 443 U.S. 307 (1979), this Court held that "upon judicial review [for sufficiency,] all of the evidence is to be considered in the light most favorable to the prosecution," 443 U.S. at 319 (emphasis in original). In petitioner's case, the court of appeals viewed only that evidence which favored the government, while disregarding guilt-negat-

ing evidence, including facts which had been stipulated.

The stipulation was central to petitioner's claim of insufficiency; it was the foundation for a reasonable and innocent explanation both of petitioner's conduct and of the events underlying the indictment. The court of appeals apparently disregarded that stipulation because it was not evidence which favored the government. There is, however, a very substantial difference between surveying only that evidence which supports the prosecution's claims, and surveying all of the evidence in a light most favorable to those claims.

The court below manifestly overlooked that difference. In the process, it gave highly equivocal evidence an unwarranted damning quality, thereby rendering hollow the teachings of Jackson, Ingram, and Direct Sales.

B. Even before this Court had decided Jackson, some of the circuits were taking care to review all of the evidence -- including that which negated guilt -- when evaluating the sufficiency of the government's proofs, and to reverse convictions where the prosecution's evidence, viewed in a favorable light, did not exclude reasonable hypotheses of innocence.

For example, the Fifth Circuit, in United States v. Haggins, 545 F.2d 1009 (1977), explicitly incorporated in its review of the proofs a discussion of the "'Negative' Evidence" (545 F.2d at 1013). Its opinion noted that the accused, who undeniably had possessed three counterfeit bills, made no effort to escape when two of them were challenged, and made no effort to destroy the third while awaiting the arrival of police. The Fifth Circuit concluded that such guilt-negating circumstances required an acquittal, because they supported a reasonable and unrefuted hypothesis that the

accused did not have criminal knowledge or intent.

Likewise, in United States v. Allison, 616 F.2d 779 (5th 1980), the Fifth Circuit allowed that the jury was free to discredit defendant Freedman's testimony that she did not know she was passing a counterfeit bill -- testimony which was bolstered by her possession of $500 in genuine currency. But the court took note that "the government's evidence was totally consistent with Freedman's version of her innocence" (616 F.2d at 784). The Allison Court continued (id.):

> The government presented no evidence of direct fact or fact upon which a reasonable inference could be drawn which would show that Freedman knew of the existence of the bills or of their counterfeit nature. Certainly, the jury could not have reasonably found that the government's evidence was inconsistent with every reasonable hypothesis of Freedman's innocence. A contrary finding would be nothing more than guilt by association.

Precisely the same analysis can be applied to the government's case against Cariello. The government produced no evi-

dence which refuted petitioner's contention that his sole concern in selecting banks was adherence to the trustees' policies; that his deposit decisions reflected the rate of interest being offered. That contention was corroborated by Cariello's disregard of the local president's alleged suggestion that more money be deposited at the Anthony Wayne Bank and by Cariello's insistence upon receiving the expected interest rate from State Bank of Springfield, in disregard of any "deal" which Palmeri might have made with the banker.

Accordingly, there is a striking conflict between the circuits as to what proofs are sufficient to establish guilt. Had petitioner been tried within the Fifth Circuit, the Haggins and Allison decisions leave little doubt that petitioner would now be exonerated. Having been tried within the Third Circuit, petitioner instead stands convicted.

The cited conflict is also manifest in the Eighth Circuit's recent decision in United States v. Wrehe, 628 F.2d 1079, 1084-85 (8th Cir. 1980). That decision is fully consistent with the Fifth Circuit's sufficiency standard and in conflict with the standard adopted below.

In reversing the mail fraud and conspiracy convictions of defendant Mary Lou Wrehe, the Eighth Circuit noted the "affirmative, uncontradicted testimony that she did not actively participate [in the incriminating] meetings" (628 F.2d at 1084). So, too, there was affirmative, uncontradicted testimony that petitioner participated in none of the incriminating meetings and conversations, but the Third Circuit apparently deemed it irrelevant to the test for sufficiency.

It is evident, therefore, that the Eighth Circuit, like the Fifth Circuit, looks to all of the circumstances -- as Jackson commands -- whereas the Third

Circuit surveys only those facts which in isolation might point towards guilt, and completely discounts compelling undisputed evidence and even stipulations if they are indicative of innocence.

There can be no more fundamental question in the administration of criminal justice than the proper standard for evaluating sufficiency of the evidence. Where there exists a sharp conflict among the circuits which can be -- and in this case is -- dispositive of a criminal accusation, and where there has been a manifest departure from the Court's "clear, not equivocal" standard, this Court's consideration is clearly warranted.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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